Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of:	)	
	)	
Implementation of Sections of	)	MM Docket No. 92-266
Cable Television Consumer	)	
Protection and Competition	)	
Act of 1992	)	
	)	
Rate Regulation	)	

COMMENTS
OF THE
UNITED STATES TELEPHONE ASSOCIATION

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SUMMARY

The Commission has been given instructions by Congress in the 1992 Cable Act as to how to deal with the monopoly power Congress found to exist widely in the cable industry. Section 2(a) of the new statute provides factual conclusions that the Commission may not nullify in its implementing regulations.

There are clear rules and guidelines given to the Commission by Congress. The Commission has an "obligation to subscribers" to "ensure that the rates for the basic service tier are reasonable," and "to protect subscribers of any cable system that is not subject to effective competition from rates that exceed the rates that would be charged if such cable system were subject to effective competition." It must "choose the best method of ensuring reasonable rates..." It also must "ensure that joint and common costs are recovered in the rates of all cable services."

The Commission must take affirmative action to ensure that rates are reasonable and that cable operators make only a reasonable profit. While a good benchmarking method may be preferable, it cannot be permitted to institutionalize monopoly rents. Most of the alternatives proposed will not eliminate those monopoly rents. Further, any initial rate, for benchmarking or ongoing price cap purposes, must undergo a thorough assessment to assure that the initial rate is in fact

just and reasonable.

The Commission must gather sufficient information to assure that rates can be set at reasonable levels. Data should be available to franchising entities, the Commission and the public.

Administrative relief, to the maximum degree allowable by the statute, is appropriate for small systems owned or operated by exchange carriers or their affiliates. The Commission should treat small systems that are not affiliated with or owned by any of the top 100 MSOs differently, giving only the small systems the relief expected by § 623(i).

Finally, there is another way for Congress and the Commission. The goals of full cable competition and reasonable cable rates can be best achieved by repeal of 47 U.S.C. 533(b), allowing Title II exchange carriers to provide cable service in their telephone service areas.

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The United States Telephone Association respectfully submits these comments on the Commission's Notice of Proposed Rulemaking (NPRM) in this proceeding, released December 24, 1992. In the NPRM, the Commission seeks to implement sections 623, 612 and 622(c) of the Communications Act (Act), as amended by the Cable Television Consumer Protection and Competition Act of 1992 P.L. 102-385 (1992) (1992 Cable Act).

I. USTA's AND ITS MEMBERS HAVE A VITAL INTEREST IN THIS PROCEEDING.

USTA is the principal national trade association of the telephone industry. Its membership includes most of the exchange carriers in the United States, and its membership provides most of the nation's access lines. USTA's interest in this proceeding is threefold.

A. Local Carriers Still Offer the Primary Means to Gain Full Cable Competition.

First, while the 1992 Cable Act outlines a response to the present problems in the cable industry that includes new regulation, USTA believes that the introduction of full competition in cable television would offer a superior result. USTA's members still constitute the best way to achieve the real ends sought by Congress - a fully competitive cable marketplace and the reasonable rates that would prevail in such a market. As the Congress concluded: "Without the presence of another multichannel video programming distributor, a cable system faces no local competition." Conference Report Number 102-862, 102d Cong., 2d sess. (1992) (Conference Report) at 55-56.

USTA trusts that this Commission remains committed to promoting full competition in the broadband video marketplace. Only by affording all exchange carriers the freedom to compete in the cable business by providing cable service in their telephone service areas can government best achieve all of the policies of the 1992 statute. The 1992 Cable Act provides for new regulation that is to accompany additional, but still-incomplete, promotion of new competition. While the Commission is bound to follow the will of Congress, USTA members' entry into cable television would provide a superior alternative.

B. Technological and Market Convergence Require Fair Rules for Competition and Regulation.

Second, given the increasing convergence of the voice, data and video marketplace (a trend that has been recognized repeatedly by this Commission), the effectiveness of regulation upon participants in one market has increasingly significant overtones for participants in other markets. The monopoly power that exists in the core cable business can be used both to exclude competition there and to gain advantage in related markets. USTA has shown to the Commission that an enormous amount of monopoly rents is taken out of cable systems in system sales and in basic cable rates, because of the presence of significant market power.[1] Congress itself concluded that this market power exists. 1992 Cable Act at § 2(a)(2).

Many cable businesses are diversifying into the same businesses in which USTA members compete. USTA members remain comprehensively regulated in their basic telephone business; thus, there is no chance that they will extract the monopoly rents that are present in the cable marketplace. Any diversification by USTA members occurs with funds that reflect regulator-accepted returns. In contrast, diversification by cable operators - diversification that itself concerned the Congress - is in part a product of profits that have been

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[1] See, e.g., Tobin's q and the Cable Industry's Market Power, Paul W. MacAvoy, February 28, 1990, filed as Appendix 5 to USTA Comments in CC Docket No. 89-600, March 1, 1990.

unchecked by either competition or regulation for at least six years. Cable remains an unregulated monopoly, and a significant part of its revenues are, in economics terms, monopoly rents.

Under the 1992 Cable Act, the Commission's obligation is to protect consumers in this regard. However, it is fundamentally unfair to USTA members for government to promote a diametrically-opposed regulatory framework for telephone service and for cable service in the face of convergence. In the continuing absence of effective controls on the accumulation of monopoly rents by cable multiple system operators (MSOs), USTA members will always be at an inherent and outcome-determinative disadvantage wherever convergence leads to competition between a MSO and a USTA member in telecommunications. USTA members will have to compete against unregulated competitors who have access to supranormal revenues. Although the 1992 Cable Act does not require regulatory parity, it directs that the Commission take certain affirmative steps to eliminate the extraction of monopoly rents. Fulfilling the Congressional mandate will move the Commission toward regulatory parity, but still will not result in comprehensive regulation. It certainly will not include the full range of price and service regulation for cable companies not subject to effective competition that still prevails for USTA members.

C. Small Companies Offering Cable Service Under the Rural Area Exemption Are Particularly Deserving of Administrative Relief.

Finally, a minority of USTA members themselves provide cable service under the "rural area" exemption. These companies are typically locally owned and operated small companies that have good relationships with their franchising authorities. Their rates are reasonable because they are committed to good service and community good will. All of these companies' cable operations merit the administrative relief in the exception that Congress intended for small systems that is set out in section 623(i).

II. RATE REGULATION IS DIRECTLY TIED TO CONGRESS' EXPRESS FINDINGS OF CABLE'S MONOPOLY POWER.

In the 1992 Cable Act, Congress found that "most cable television subscribers have no opportunity to select between competing cable systems." 1992 Cable Act at § 2(a)(2). It found that "without the presence of another multichannel video programming distributor, a cable system faces no local competition." Id.

Congress concluded that "The result is undue market power for the cable operator as compared to that of consumers and video programmers." Id.

Congress also found that "the cable industry has become a dominant nationwide video medium." 1992 Cable Act at § 2(a)(3).

It declared that "The cable industry has become "widely concentrated" (1992 Cable Act at § 2(a)(4)) and that "the cable industry has become vertically integrated." (1992 Cable Act at § 2(a)(5)).

These sections - sections 623, 612 and 622(c) - implement what are perhaps the most important provisions of the 1992 legislation. It is because of the repeated abuses of monopoly power by cable operators that Congress enacted the new statute. The legislative history is well-populated with findings related to repeated rate increases, lapses in customer service and other problems. Indeed, the primary finding of Congress in the legislation is that "Since rate deregulation, monthly rates for the lowest-priced basic cable service have increased by 40 percent or more for 28 percent of cable television subscribers. Although the average number of basic channels has increased from about 24 to 30, average monthly rates have increased by 29 percent during the same period. The average monthly cable rate has increased almost 3 times as much as the Consumer Price Index since rate deregulation." 1992 Cable Act at § 2(a)(1).[2]

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[2] The House of Representatives found that "(t)he FCC rules governing local rate regulation will not provide protection for more than two-thirds of the nation's cable subscribers and will not protect subscribers from unreasonable rates in those communities where the rules apply." See Conference Report at 53.

The provisions of Section 623 are intended to assure that consumers have the opportunity to purchase basic cable service at reasonable rates. It is the role of the Commission to ensure that rates for the basic service tier are reasonable. Conference Report at 62.

Since the statute is near-exclusive with respect to rate regulation, Congress made clear how rate regulation is intended to work:

- "(T)he Commission shall, by regulation, ensure that the rates for the basic service tier are reasonable..." (emphasis added), and
- "(T)he goal of such regulations is to protect subscribers of any cable system that is not subject to effective competition from rates that exceed the rates that would be charged if such cable system were subject to effective competition." Conference Report at 62.

The Congress gave the Commission some mandatory duties. The Commission must perform the responsibilities that Congress has assigned to it. The Commission must be both careful and thorough in assuring that the Congressional mandate is faithfully carried out.

III. THE COMMISSION MUST ENSURE BASIC TIER RATES ARE REASONABLE AND COMPLY WITH ITS CONGRESSIONAL MANDATE.

These comments focus on the core provision of the statute that requires the Commission to "ensure that rates for the basic service tier are reasonable." § 623(b)(1). The caption of that

subsection indicates the nature of the work Congress expected: "COMMISSION OBLIGATION TO SUBSCRIBERS." It is essential that the Commission recognize this obligation and comply with it.

The Congress expressed a policy in favor of competition in the 1992 Cable Act, both generally and in its assessment of the need for local and federal regulation. However, the statute does require some affirmative action by the Commission - action that must be consistent with the Cable Act's factual underpinnings. The central findings of the Cable Act conclude that cable television remains an unregulated monopoly business. While USTA continues to advocate an approach that would bring the full discipline of competition to bear in the cable marketplace, through repeal of the cross-ownership provisions in 47 U.S.C. 533(b), these comments deal with the reality that that solution is not yet forthcoming.

Section 623 can be expected to become operative for most cable systems. It would be unlawful for the Commission, which must implement the will of Congress, to develop rules that negate the impact of the Congressional findings for a significant proportion of the cable industry. The Commission is without power to redefine the scope and intent of the 1992 Cable Act or to act at odds with it. Likewise, it cannot deny or contradict the findings of Congress set out in Section 2 of the 1992 Cable Act.

Unfortunately, the NPRM could be viewed by an interested participant in this proceeding as laying the groundwork for exactly such a statute-nullifying administrative action. One searches the NPRM in vain for any recognition of the Congressional findings set out in the statute. One is left with only two sentences in Appendix B to the NPRM that acknowledge what Congress said. There, the Commission belatedly states:

> "The Cable Act of 1992 found that cable operators face no effective competition in most markets, and that cable service customers have experienced rapidly increasing rates since deregulation." (NPRM at Appendix B, ¶ 4); and
>
> "The Cable Act of 1992 reflects the view that many cable markets are not competitive and that the resulting industry market power has been used to raise rates above competitive levels." NPRM at Appendix B, ¶ 9.)

The Commission misapprehends that statute's significance. It is far more that a "view." The Commission must accept the findings in the statute.

The Conference Report articulates in some detail what the Congress expects of the Commission. The Commission has discretion "to adopt formulas or other mechanisms and procedures "to ensure that rates are reasonable." Conference Report at 62. While it can choose the method, it nevertheless must "choose the best method of ensuring reasonable rates for the basic service tier." Id.

The Commission must "ensure that joint and common costs are recovered in the rates of all cable services." Conference Report at 63. (Emphasis added.) The Congress also has required that the Commission not allow the regulated basic tier to be used as a revenue base from which cable operators can collect the bulk of their revenues. The Conference Report states clearly that "(T)he regulated basic tier must not be permitted to serve as the base that allows for marginal pricing of unregulated services." Id. (Emphasis added.)

Any Commission regulation that meets the requirements intended by Congress must reduce or retarget each basic service tier rate in an area lacking effective competition to one that will permit a reasonable profit, but fully corrects for the presence of monopoly rents. To do so, the Commission may have to affirmatively identify what is a "reasonable profit" under § 623(b)(2)(c)(vii). And, although comprehensive regulation such as that experienced by exchange carriers is not initially required, the Commission must complete the duties that are restated above, in the preceding paragraph of these comments.

Under § 623, the Commission must take some affirmative action to ensure rates are reasonable absent "effective competition." Two generic approaches to regulation of rates for basic tier service have been identified by the Commission: benchmarking regulation and cost-of-service regulation. NPRM at

¶ 33. The Commission has indicated a preference for the former as the primary mode of regulation.[3] Id. It concludes that cost-of-service principles could have a secondary role, and could be used when rates do not meet the Commission's primary benchmarking standard. Id.

The Commission identifies five general forms of benchmark:

(1) an average of rates currently charged by systems facing effective competition, as identified by the Commission (NPRM at ¶ 43);[4]
(2) a benchmark of basic tier rates charged in 1986 (NPRM at ¶ 44);
(3) an average of current (1992) rates on a per-channel basis (NPRM at ¶ 46).
(4) a "typical system" benchmark based on a Commission cost-of-service estimate (NPRM at ¶ 48); and
(5) a "price cap" benchmark ¶ 48 cost of service benchmark (NPRM at ¶ 49).

Only in the first two, (1) and (2), would the Commission have any opportunity to drive out monopoly rents. In all of the

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[3] However, this preference is expressly conditioned upon the Commission's ability to gather the information necessary to develop an alternative that meets the Congressional mandate. NPRM at ¶ 33.

[4] The Commission asks whether certain operations constitute "multichannel video programming distributors" (MCVPDs) for purposes of measuring effective competition. The original description, in S. Rep. No. 102-92, 102d Cong., 1st Sess., (1992) (Senate Report), at 71, assumes this classification would apply to a person who makes available multiple channels of programming to subscribers to its video programming services. For reasons set out here and in other implementation proceedings, USTA believes that the MCVPD category should not include video dialtone providers or leased access users. A video dialtone provider cannot yet provide video programming directly to subscribers.

others, the benchmark would embrace and perpetuate noncompetitive rates. An endorsement of rates that continue to include monopoly rents would not meet the Commission's statutory "Obligation to Subscribers." The first benchmark also will be likely to be heavily weighted with the rates charged by systems in competition only with municipal systems, a factor that could affect the achievement of a fully-market-based result. While a benchmark may have merit when implemented in light of good data and an objective assessment of what competitive rates should be, it is not yet clear whether the Commission can in fact do that with cable television.

The Commission recognizes that a "price cap" benchmark is better used to determine reasonable increases in rates, rather than to determine the initial reasonableness of rates. NPRM at ¶ 49. When price caps for exchange carriers was implemented, the Commission first had completed a number of proceedings that gave the Commission comfort that rates were in fact fully just and reasonable within the requirements of Title II. In contrast, the use of a price cap formula here would provide no comfort at the time of implementation about the relationship of current cable rates to cable rates that would prevail in a competitive environment. If the original price chosen here is contaminated with monopoly rents, a price cap arrangement will not eliminate

them.[5] That is far different from the initial rate benchmarks used for exchange carriers.

Regardless of whether or not the Commission adopts and uses a benchmark, streamlined cost-of-service approach should be available particularly if a systems basic tier price fails a benchmark test. Using only some cost of service measures would not equate to cost of service regulation; instead, these measures may contribute to an effective cable service benchmarking framework. The Congress has indicated it expects some specific steps be followed to meet the mandate of the statute in any event.

The Commission is overly concerned that cable rate regulation will be too onerous. It focuses on this concern to the exclusion of the other statutory requirements. That view, however, places regulatory procedure over the substantive requirements of the statute. The Commission cannot "protect cable subscribers" and at the same time fail to take the steps the governing statute requires. The Conference Report requires some assessment of joint and common costs. Conference Report at 63. A requirement that cable operators undertake the identified necessary steps is still far less onerous than the comprehensive

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[5] The proposed price cap formula options set out in the NPRM are significantly more lenient than the exchange carriers' price cap formula.

regulation that is now applied to exchange carriers, for example.

The safeguards expected by the Congress must focus on allocation that is appropriate. When the Commission adopted cost allocation principles for exchange carriers in Part 64, the rule embraced generally accepted costing principles. These basic principles (which themselves do not include any cost allocation manual requirement) are concise and can be used here. The provisions of 47 CFR 64.901 should be an integral part of any benchmark or other formula used to establish and maintain basic cable rates. The plain requirements of the statute and the Conference Report take precedence over the House Report[6] language cited in the NPRM at note 87.

IV. THE COMMISSION MUST GATHER SUFFICIENT INFORMATION TO ASSURE THAT IT WILL BE ABLE TO PERFORM ITS RESPONSIBILITIES.

The statute requires that the Commission adopt regulations that require cable operators to file with it or the franchising authority "such financial information as may be needed for purpose of administering and enforcing this section." 47 U.S.C. § 623(g). This information must be filed annually. The legislative history indicates that this information must be filed with the franchising authority where that authority regulates basic rates. Conference Report at 65. It is the Commission that defines the information to be collected. Id.

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[6]H.R. Rep. No. 102-628, 102d Cong., 2d Sess. (1992).

In prescribing regulations here, the Commission must ensure that this information will enable it to carry out its responsibility to subscribers to assure basic cable service rates will be reasonable. The Commission should assure that it will receive copies of financial data that is filed, even if it is also to be filed on the local level. That data should be available to the public as well.

USTA concurs generally with the need for at least that data that is presented in Appendix A. Ref. NPRM at note 84. That data is needed from systems of more than 1000 subscribers whether or not the Commission adopts a benchmark or cost of service alternative. USTA disagrees with a rule that suggests there are only limited circumstances in which this might be required, as posited in § 57 of the NPRM.

V. ADMINISTRATIVE RELIEF IS APPROPRIATE FOR SMALL SYSTEMS OWNED OR OPERATED BY EXCHANGE CARRIERS OF THEIR AFFILIATES.

The statute contemplates relief for small systems. § 623(i) requires that the Commission design its regulations "to reduce the administrative burdens and cost of compliance for cable systems that have 1000 or fewer subscribers." The Commission requests comment on ways to achieve this relief.[7]

[7] NPRM at ¶¶ 128-133.

Many USTA member companies have cable systems in place that have 1000 or fewer subscribers. For these systems, USTA supports the maximum relief contemplated by the statute. In particular, USTA endorses relief from all new accounting and data collection requirements, as proposed in ¶ 129 of the NPRM, and suggests that the Commission avoid collection of individual system data from small systems as described therein. USTA also agrees that small systems be exempted from the requirements set out in ¶ 130 dealing with broadcasting relationships and technical standards. Finally, cable systems affiliated with exchange carriers should be subject to different rules on rate regulation. See NPRM at ¶ 131. These small system rates should be undisturbed absent complaint from the franchising entity or a significant outpouring of complaint from subscribers. Many state legislatures or commissions have found that the related exchange carriers are policed sufficiently through day-to-day community interaction and feedback, and they have effectively deregulated these operations, without adverse impact. This should hold for these small systems.

USTA agrees that the Commission should distinguish between types of small systems, so that its rules governing small systems will not be used by larger systems to selectively evade the intent of Congress. Large cable systems and cable operators have greater ability to comply with detailed regulations. Their management is typically geographically removed. Of equal import

is the fact that larger systems owned by MSOs have greater leverage with respect to local government when it comes to franchising, complaints and court proceedings. The large MSOs have the size and resources to take advantage of an individual municipality. The exemption, then, should be focused on those small systems where significant leverage cannot be exerted by a controlling cable organization. A way to address this is to provide relief to cable businesses where the system, or a few related systems, are small in size and geographically close together. A simple threshold would be to provide relief to small systems of businesses that are not within or affiliated with any of the top 100 MSOs, and that meet the Congressional 1,000 subscriber threshold.

VI. COMPLAINT PROCEDURES SHOULD NOT POSE A BURDEN TO THE PUBLIC AND SHOULD CONTRIBUTE TO ACHIEVEMENT OF THE PRIMARY OBJECTIVE OF THE STATUTE - TO ENSURE THAT RATES ARE REASONABLE.

The Commission seeks comment on a wide range of specific complaint procedures. However, the Commission poses some alternatives that were not contemplated by Congress and that would unreasonably limit the opportunities to be heard by subscribers.

For example, the Commission leaves open the possibility that it will standardize complaint forms and language. NPRM at ¶101. Any basic form that is developed by the Commission for complaints about an unreasonable rate should not be exclusive. Individual

subscribers and franchising authorities may frame their complaints uniquely. Other alternatives for complaining of unreasonable rates can meet the expectations of the statute equally well.

The NPRM suggests that a complaint mechanism must include a minimum threshold so as to allow the Commission to screen out frivolous or unsubstantiated complaints. NPRM at ¶ 100. In doing so, the Commission seeks to differentiate its tentative view that it and cable operators "permit only genuine allegations of illegal rates to go forward" from the Congressional mandate (that the Commission acknowledges) that a complaint about cable rates need not demonstrate a prima facie case. Conference Report at 82; NPRM at ¶¶ 99-100.

The law contemplates only a procedure for a "minimum showing." Conference Report at 64. A form of the initial option set out in ¶100 could provide a workable complaint arrangement. The identification of the subscriber, the cable operator listed on the bill, the new rate, and an allegation generally identifying the rate as objectionable or unreasonable, should provide the gist of the complaint anticipated by Congress. Multiple standards for pleading are not needed. Contrast NPRM at ¶101.

The Commission would involve the franchising authority in every complaint, requiring it to file information or to take other affirmative acts. NPRM at ¶ 102. This is more than Congress anticipated, and would unreasonably burden both the franchising entity and the complaining subscriber, prejudicing both as a result.

There are certain facts peculiarly in the control of a cable operator that should be obtained by the Commission with any complaint. That information involves any prices actually paid by the cable operator to receive and resell each channel in the basic tier, the cost allocations that were used in devising the basic rate, the allocation methods used for PEG and local access channels, the allocation methods used to apportion any franchise fees, and other allocations of advertising, promotions, continuing franchise obligations and relationships, and similar general expenses.

USTA cannot comment on the relationship between the complaint process and the test for reasonableness of rates at this time. If a benchmark test is used, the particular benchmark would significantly impact how complaints should be handled. Some of the proposed benchmarks do not provide for reasonable rates.

The Commission has authority to roll back rates that are unreasonable under § 623. The Commission believes that it lacks this authority in the complaint process. NPRM at ¶ 105. However, this particular statutory section focuses only on ongoing rate reasonableness. It covers more than prospective relief dating, not just from Commission action, but from, at minimum, the date of the complaint. The general framework of § 623 may even extend further, perhaps to the time after the enactment of the statute when the rate first became unreasonable. See NPRM at ¶ 105; Contrast with NPRM at ¶ 108. The standard is not the standard in Title II. Lessened cable regulation anticipates greater risk of cable subscriber exploitation. The Commission should use its § 623 authority to minimize that risk or to redirect it to cable operators who abuse their position. The statute anticipates greater risk for cable operators who are "bad actors" when rate relief is merited.

VII. CONCLUSION.

The Commission is a creature of statute. The purpose of the statute is to secure and protect the public interest and to protect customers. Woko v. FCC, 109 F2d 665 (D.C. Cir 1940); See also MCI v. AT&T, 462 F.Supp. 1072 (D.C. Ill. 1978). The Commission has a unique obligation to subscribers here.

The Commission's obligation to subscribers is to apply the new statute taking into account the intent of Congress, best expressed in the Conference Report. These comments seek to identify how the statute and the Conference Report should be applied.

Respectfully submitted,

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